No. 2729.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY,
a Corporation,
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY,
a Corporation, and SOUTHERN PACIFIC
COMPANY, a Corporation,
Appellees and Defendants.

Points and Authorities of Appellees and Defendants.

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By ..... *Deputy Clerk.*

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STATEMENT OF THE CASE.

The transcript involves but one appeal, to-wit: from the decree of the District Court dismissing the suit upon the motion of the appellees and defendants after the refusal of the appellant and the complainant to amend its complaint. There are, in fact, fifteen similar suits, but no appeal has been taken from the similar decree in each of said cases, although there is an attempt, on the part of the appellant, to have this Court consider the same by reason of a purported order of consolidation in the District Court (Trans. pp. 42.43).

The original complaint was an action to quiet title and, undoubtedly, sufficient in form under the law of the State of California. In the original complaint there was no averment as to whether or not the complainant was or was not in possession, or whether the defendant Southern Pacific Company was or was not in possession, the only allegation in regard to possession being contained in paragraph VII of the original complaint (Trans. p. 3), which stated that the defendant Central Pacific Railway Company was not in possession. The defendants answered the original complaint, and did not seek to have the title of the complainant quieted, but merely alleged possession and set up some equitable defenses.

The original bill of complaint was superseded by an amended bill, which was substantially the same as the original bill, except that paragraph VIII was added (Trans. p. 16), which set forth that the defendant Southern Pacific Company was and is a public service corporation, and as such corporation was in possession of and using all the land described in the complaint. An amendment was made to the amended bill, in which it set forth that the defendants Southern Pacific Company and Central Pacific Railway Company are, and each of them is, engaged in the general business of railroad corporations as common carriers of passengers and freight, and that the Southern Pacific Company maintains upon and over a portion of the property, not describing it however, a railroad main track, over which it operates trains. That on other portions of said property the said com-

pany maintains other railroad tracks, which are switching tracks, and a large structure known as the Sacramento freight sheds, and sheds used as a wharf bordering upon the Sacramento River. It is then averred that the public interest did not require the maintenance of the continuance of the said last mentioned tracks or sheds, but that all of the same were used exclusively by the said defendant Southern Pacific Company, and that the said company claims that, as a public service corporation, it is entitled to the continuous and exclusive use of said tracks, sheds and the land upon which the same are situated. The amendment then sets forth certain allegations bearing upon the location of the land, namely: that it is situated near the foot of certain streets in the City of Sacramento and borders upon the Sacramento River, and that the land described in the complaint, together with land adjacent thereto not described, is the most convenient point for the shipment of freight into and from the City of Sacramento, and that the public interest of the citizens of the City of Sacramento and of the County of Sacramento require that said property should not be used exclusively by said defendant Southern Pacific Company, and that the use of said property by said company is subordinate to the requirement of the public interest.

A motion to dismiss the suit, after the filing of the amended bill, was made (Trans. pp. 22-24), and the amendment to the amended bill was made at date of hearing of said motion, to-wit: June 21st, 1915. At the same time a motion to transfer the action to the

law side of the court was made by the defendants (Trans. pp. 66-68), and also a motion for a better statement and for further and better particulars (Trans. pp. 68-70), and, likewise, a supplemental motion for further and better particulars as to paragraph IX added to the amended bill was made and noticed for July 12th, 1915 (Trans. pp. 71-74).

On July 1st, 1915, a stipulation was entered into between counsel that the defendants' motion to transfer the cause to the law side of the court, also for further and better particulars and also to dismiss said cause shall be taken and deemed to be made with reference to and applied to the amended complaint, as amended June 21st, 1915, which is the amendment to the amended bill adding paragraph IX, and an order of Court was made in conformity therewith. (See stipulation and order (Trans. p. 70). This stipulation was, in effect, a consent of the complainant that the motion to dismiss, as well as the other motions, should be made and heard by the Court, and at no time does the transcript show any objection on the part of the complainant to the procedure which was followed, or to the presentation and decision of the motion to dismiss, until the opinion of the District Court, adverse to it, was rendered. It is apparent, therefore, that the only matter to be considered upon this appeal is the allegations of the amended bill and the amendment thereto, above referred to, and the motion to dismiss the suit.

The opinion of Honorable William C. Van Fleet, Judge of the court, is set forth in full in the transcript

(Trans. p. 25 *et seq.*), from which it appears that the motion to dismiss was presented to the Court, without objection on the part of the complainant, it, at that time, being willing that the sufficiency of the amended complaint should be determined by the Court (Trans. pp. 25 to 39). The District Court allowed the complainant ten days after the date of the order dismissing, to-wit: December 1st, 1915, in which to amend its complaint, if so advised, and of which order notice was duly given, and the said complainant having declined to amend its said amended bill within said time, or at all, a decree was filed and entered December 22d, 1915, dismissing the action. (Trans. pp. 44-45.)

Notwithstanding, the complainant, without objection, participated in the argument of the motion to dismiss, and notwithstanding the order of the Court made on December 1st, 1915, dismissing the action (Trans. p. 40), and notwithstanding that the complainant was in default in not amending its complaint within the ten days allowed, it, on December 15th, 1915, applied to the clerk of the court for an order taking the amended bill and the amendment to the amended bill, *pro confesso* (Trans. pp. 40-41,) but upon motion of defendants, the Court, on December 20th, 1915, vacated and set aside the order so made, holding that it was inadvertently and inadvisedly made.

Appellant's brief was received on March 18th, 1916, by counsel, who has prepared this brief. As the appellees' brief must be served and filed by March

25th, 1916, the cause being set for hearing for March 28th, 1916, it will be impossible for counsel to fully answer all of the points contained in appellant's brief, consisting of one hundred and fifty pages, and to analyze all of the authorities cited therein, at least one hundred and fifty in number, within the time allowed by the rule of court. Hence, counsel for appellees will submit the points and authorities bearing upon the question so far as time will enable them to prepare the same, and at the oral hearing will ask the Court for appropriate time in which to file an additional brief, fully answering and analyzing the points and authorities of the appellant.

The opinion of Honorable William C. Van Fleet, Judge of the District Court, upon the question of dismissing the suit is set forth in the transcript (Trans. p. 25 *et seq.*), and the same, without being repeated here, is adopted as a part of appellees' argument and brief.

STATEMENT OF POINTS OF LAW DISCUSSED.

I. The complaint stated no cause of equitable cognizance, because it appeared that complainant was out of possession and a defendant was in possession and occupation of the premises. The legal remedy is adequate.

II. Procedure, including the rules of pleading, is governed by Federal practice, and not by state practice, even where rights given by state laws are being enforced in Federal Courts.

III. The complaint stated facts showing no cause of action in favor of complainant at law or in equity.

IV. Defendants were not in default, and hence it was error to take the bill *pro confesso,* and was proper to vacate the decree *pro confesso.*

V. The suit was properly dismissed and not transferred, for the reason that a transfer would have been futile.

VI. There was no joinder in appeal to equitable jurisdiction, and hence no waiver of objection to jurisdiction.

VII. The order for consolidation was improper and ineffectual for any purpose.

POINT I. DEFICIENCY OF THE COMPLAINT IN EQUITY.

The element of possession.

The amended complaint states that complainant is the owner in fee of the property, and that the defendants claim some interest adverse, but without right. It is not averred that the plaintiff is in possession. It is averred that the defendant Central Pacific Railway Company is not in possession, but that the defendant Southern Pacific Company is in possession, and that it is a public service corporation and using the land as such public service corporation. Equity has no jurisdiction in an action to quiet title, unless the complainant is in possession, or the land is unoccupied.

Whitehead v. Shattuck, 138 U. S. 146;
Southern Pacific Co. v. Goodrich, 57 Fed. 879.

The case of *Whitehead v. Shattuck,* 138 U. S. 146, was approved in *Northern Pac. R. Co. v. Amacker,* 49 Fed. 537, 7 U. S. App. 33, disallowing suit to quiet title where plaintiff is not in possession; *Gordon v. Jackson,* 72 Fed. 88, 89, *Gombert v. Lyon,* 80 Fed. 305, *Erskine v. Forest Oil Co.,* 80 Fed. 586, *Blythe v. Hinckley,* 84 Fed. 256, *Davidson v. Calkins,* 92 Fed. 232, 234, 236, and *Hughes v. Hannah,* 39 Fla. 373, 22 So. 615, all disallowing suit in equity where defendants are in possession; *Spokane Mill Co. v. Post,* 50 Fed. 431, 432, refusing to enjoin nuisance on facts; *Southern Pac. R. Co. v. Goodrich,* 57 Fed. 880, 881, bill to quiet title must allege that plaintiff is in possion, or that both are out of possession; *Sanders v. Devereux,* 60 Fed. 314, 315, 19 U. S. App. 630, bill for partition must show seisin or possession of plaintiff; *Frey v. Willoughby,* 63 Fed. 866, 27 U. S. App. 417, tenant in common out of possession cannot maintain bill for partition.

Holland v. Challen, 110 U. S. 15, which is fully analyzed in *Whitehead v. Shattuck*, 138 U. S. 146, is not authority for the principle that in equity a complainant out of possession can sue a defendant out of possession in an action to quiet title where the land is occupied by some other person. Note the discussion in *Whitehead v. Shattuck*, 138 U. S., p. 155, where it refers to the land involved in *Holland v. Challen* as being unoccupied by any person. The true

owners must obtain possession through ejectment on the law side from the occupant and after he has obtained possession, if there is a cloud upon his title commence a suit in equity to remove the same, but if the land is unoccupied, it would be impossible for him to bring an action in ejectment, and, hence, under the doctrine of *Holland v. Challen, supra,* he can bring his suit in equity without first obtaining possession. *Holland v. Challen* may have been construed by some Courts as authorizing a suit in equity in the nature of an action to quiet title to be maintained by a complainant out of possession against a defendant out of possession, but a careful analysis of the facts of the case, as well as the discussion of it in *Whitehead v. Shattuck, supra,* shows that the principle was announced only as to land that had no occupant at all. The complaint in the present case, therefore, in order to state a cause of action against the defendant, Central Pacific Railway Company, should have alleged that the land in question was unoccupied, but, on the contrary, it is averred that it was occupied by the Southern Pacific Company and devoted to public purposes.

The case of *Southern Pacific Railroad Co. v. Goodrich,* 57 Fed. 879, was approved in *Davidson v. Calkins,* Circuit Court, S. D. California, 92 Fed. 231-239, and also in the case of *United States Mining Company v. Lawson,* Circuit Court, D. Utah, 115 Fed. 1005-1008.

Complainant will not be permitted to maintain a suit to quiet title on the equity side of the Federal

Court when it does not allege possession in itself, but, on the contrary, alleges possession in one of the defendants, and that another defendant is out of possession, for if this is so, an action to quiet title could be maintained on the equity side of the Federal Court by complainant out of possession against a defendant in possession, and the plaintiff could confer jurisdiction of ejectment on a chancellor by the mere expedient of joining one or more defendants out of possession. Complainant should recover possession, if it is the legal owner of the property, on the law side of the court, and then after it recovers possession, if it establishes such legal ownership, it is put in a position to maintain a suit on the equity side against the defendant out of possession.

The motion to dismiss, on the part of the defendants, was made jointly and severally. As to the Southern Pacific Company, the defendant in possession, complainant, upon the face of its amended bill, ousted the court of jurisdiction. As to the Central Pacific Railway Company, out of possession, there is no case holding that a suit to quiet title on the equity side can be maintained against such defendant, unless the land is wild, uncultivated and unoccupied, and in this case the bill on its face negatives any such assumption, as it is averred that the land is in the possession of the Southern Pacific Company and all devoted to railroad purposes for the public use. There are no allegations in the complaint which show when the Southern Pacific Company took possession of the property in question, or when it devoted the same

to public use. For all that appears in the complaint, it may have been in possession through itself and its predecessors in interest in such railroad use for a period of time which will presume a grant from the predecessors in interest of plaintiff.

When the amended bill and the amendment to the bill was filed the fact that the Federal Court on the equity side had no jurisdiction was, in fact, conceded, and it was claimed that jurisdiction on the equity side could be conferred by alleging that all of the property in question was not necessary to the railroad use in the discharge of its duties as a common carrier of passengers and freight. A railroad company can condemn, not only for main line tracks, but also for switching tracks, sheds, depots and wharves.

If it is claimed that the Southern Pacific Company is in possession of some portions of the property described in the complaint, which it could not have condemned, then complainant, by describing such portions in an action in ejectment, could maintain its action upon the law side, and probably could do so in the statutory form of an action to quiet title, and if the complainant did not know, or could not ascertain what these portions were, it could have attacked the entire holding of the defendant Southern Pacific Company and so compelled the Southern Pacific Company to eliminate at the trial the portions of the property which it would have the right to hold. We do not concede this to be the correct view, but, according to appellant's theory, it should have done so, if it cannot so draft its pleading as to require the

Court to determine, as a legal question, what property is necessary to the railroad use, especially when it alleges that it is all used for general railroad purposes in the discharge of the public duty, which the railroad company owes.

The right to condemn in eminent domain is attributable to legal jurisdiction, and the necessity for such condemnation is always a question to be determined in a condemnation proceeding. If, however, the railroad company acquires private property by grant, or enters upon private property and devotes it to public use, the question of whether the property is a necessary use is foreclosed, as it is clear that a railroad company has the right to condemn not only for the present use, but also for future uses, when they can be reasonably anticipated. If the Southern Pacific Company, or its predecessors in interest, have taken the property of the complainant without grant from it, or its predecessors, or without judgment in condemnation, then it is clear that the Southern Pacific Company, or its predecessors owe to the owners of the land at the time of the taking the market value of the land so taken, what is commonly known as "damages" for the taking, and these damages are ascertainable in a suit at law, and under the present Constitution of California (Constitution of 1879, Art. I, Section 14), the question of damages must be ascertained by a jury. If the taking has been without grant, or without such judgment in condemnation, the only recourse that the owner has is to sue for the value at the time of the taking, and this right belongs

to the owner at the time of the taking. It is, therefore, apparent that when the complainant alleged that all of the property was devoted to the public use, then equity had no jurisdiction to determine what was necessary, or what was not necessary, as this would permit the court then to become an administrative body to determine what property the railroad company should use and what it should not use. Complainant had ample opportunity to amend its complaint, so as to set up the claim for damages, but when it conceded the possession of all the property in the Southern Pacific Company and its devotion to public purposes, it could not further claim that an action to quiet title would be maintained, as the only remedy in such a case is one for damages, based upon the value of the property at the time of the alleged taking.

Complainant states that the decisions which hold that an action to quiet title on the Federal side cannot be maintained, unless it is alleged in the complaint that the complainant is in possession, or that the land is unoccupied, is based upon section 723 of the Revised Statutes, now Judicial Code, sec. 267, which provides that equity will not maintain a suit where there is a plain, speedy and adequate remedy, while the authorities cited in this brief show that in the absence of such statute, equity would refuse to entertain jurisdiction where there is a plain, speedy and adequate remedy at law. Complainant does not show in its bill that it has not a plain, speedy and adequate remedy at law.

The contention of appellant that there are cases when a bill will be retained by a Federal Court to quiet title, regardless who is in possession, is unsound because inaccurate. (Appellant's Brief, p. 45.)

The cases cited by complainant to support this proposition, as far as we have examined them, are distinguishable in that every one of them showed some independent and distinct ground of equitable relief on which the bill might have been retained without reference to the object of quieting the title. For instance, the case of *Woods v. Woods*, 184 Fed. 159, sought a partition and accounting, and, incidentally, the quieting of title. The cases of *Gormley v. Clark*, 134 U. S. 338; 33 L. Ed. 909, and *Sharon v. Tucker*, 144 U. S. 545; 36 L. Ed. 536, were both suits which sought to restore or establish of record the evidences of complainant's title, and, incidentally, to quiet his title. An examination of all of the cases cited by complainant, and many others, will show that a bill to quiet title has been retained in one of the two classes only. First: where the quieting of the title is the principal object of the suit, unmixed with other grounds of equitable relief; and, Second: where an independent ground of equitable relief is pleaded and the quieting of title is incidental or supplemental to that. Complainant has cited no case in which a bill solely for the quieting of title has been retained against a defendant in possession. The Federal Courts have recognized the distinction here made against complainant's cases, with respect to the jurisdictional fact of possession, in the following cases:

Klenk v. Byrne, 143 Fed. 1008; *American Association v. Williams,* 166 Fed. 17; *Peck v. Ayers & Lord Tie Company,* 116 Fed. 273; *U. S. Mining Company v. Lawson,* 115 Fed. 1005; *Cosmos Exploration Company v. Gray Eagle Oil Company,* 112 Fed. 4. All these cases discussed the sufficiency of an independent equitable right to sustain a bill for the quieting of title, which, because plaintiff had not the requisite possession, was not otherwise sustained.

All the cases cited both by complainant and by defendant, will be found to harmonize if this distinction be observed.

As complainant has alleged in its bill no independent or distinct equity, and as it also alleges defendant in possession, the bill is not sustainable in equity under the rule of *Whitehead v. Shattuck,* cited by defendant.

If *More v. Steinbach,* 127 U. S., p. 70, is authority for the principle that an action to quiet title can be maintained by the plaintiff out of possession against the defendant in possession, then it is overruled by the later case of *Whitehead v. Shattuck, supra.* It would seem, however, that the lands in *More v. Steinbach* were unoccupied.

See also *Boston & M. Consol. C. & S. Min. Co. v. Montana Ore Purchasing Co.,* 188 U. S. 632, 47 L. Ed. 626, approving *Whitehead v. Shattuck, supra,* stating: "The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in the Federal Court."

Appellant's citations, at pages 47-73, inclusive, are designed to show that ejectment will not lie to take property out of possession of a defendant which is devoting it to public uses for which condemnation proceedings might lie; also to show that equity will grant injunction against such appropriation without just compensation. Both foregoing propositions are true, but it does not at all follow that an accomplished appropriation can be undone by a suit to quiet title. The denial of remedy by ejectment rests on the superior public interest and right; hence, it is not necessarily true that there must be an equitable remedy because there is none at law. There is none on either side of the court to recover the land, because there is no right to recover it from the public use.

The principles announced in *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387 (cited in appellant's Brief, p. 48), have no application here. An appeal was taken from a decree in a bill or information, filed by the State of Illinois against the Illinois Central Railroad Company, the City of Chicago and the United States, and a cross-bill therein filed by the city against the railroad company, the United States and the state. The object of the litigation was to determine the rights, respectively, of the state, of the city and of the company in land submerged or reclaimed in front of the water line of the city on Lake Michigan.

In the case at bar, the complainant has no connection with the State of California, or the City of Sac-

ramento. It does not appear how, where or when the title of the defendants was obtained. It presents a case of a controversy between a public service corporation on one side and individual defendants claiming to own the property. Even if a grant from the State of California, or the City of Sacramento should be involved in the controversy, although none, as yet, appears, it does not follow that a private claimant to the property could claim any benefit under the Lake Michigan decision in spport of his claim of title. If the State of California, or the City of Sacramento, originally owned the property in question and had granted it to the defendants, or their predecessors in interest, and such grant was ultravires, the State, or the city, if the Lake Michigan case applies, might make of the claim to the recovery of the property.

The Elevated Railroad cases cited by appellant, at page 59 of its brief, to show that equity takes jurisdiction in cases of this kind to determine rights of the adverse claimants are not in any sense authority for such a doctrine. Mr. Lewis' Eminent Domain [3 Ed.], sec. 892, points out that they are in substance suits to ascertain compensation and to adjudge that future operation be restrained if the compensation be not paid. The principle object is compensation, and the injunction is an alternative. How such a precedent will help appellant is not pointed out by its brief.

The bill cannot be sustained by regarding the possession alleged to be in Southern Pacific Company as immaterial.

Plaintiffs, in joining the several defendants, must be taken to have asserted a liability "against all of" them (New Equity Rules No. 26), since they have pleaded no facts showing grounds for uniting distinct causes of action to promote convenient administration of justice. (Id.)

If the asserted liability be "against all of them," then a defense open to the bill in favor of one of them (Southern Pacific Company) will defeat the bill as an entirety, no separate cause of action being set out with reason for uniting it.

It is clear and practically conceded (plaintiff's Brief, p. 36) by this argument that possession of Southern Pacific Company as against plaintiffs would be fatal to the bill if that corporation were the only defendant. The bill framed on a theory that the liability is against both cannot be made good by treating one of defendants as an immaterial one at plaintiff's suggestion.

Legal or equitable nature or cause of action. The cause finally pleaded was purely legal.

It is incorrect to say of a suit brought under California Code of Civil Procedure, sec. 738, that it is a "suit in equity *per se*." (Appellant's Brief, p. 12.) Whether the essential quality of such a suit will be equitable cannot be told under the practice in Cali-

fornia in a suit brought under that section until the issues are finally made up; and when by such a proceeding the defendant discloses his claim of title it may result in tendering purely legal issues to be joined and tried. This is explained in *People v. Center,* 66 Cal. 551, at p. 562.

To the same effect is *Hyde v. Redding,* 74 Cal. 493.

The effect of California Code Civ. Proc., sec. 738, is not only to enlarge the equitable rights of one claiming title against another who disputes it, but also to provide a remedy by which the State courts may administer such rights so enlarged. It is true that a Federal Court of equity will enforce by its equitable procedure such enlarged equitable rights as a State statute may confer; but it is equally true and quite important to remember that they will do so according to their own procedure and pleading.

When the bill was finally amended the facts stated sufficed to make out nothing but a defectively pleaded cause of action for damages. At an earlier stage it pleaded in effect a cause of action for recovery of possession from defendants. Both these are purely legal.

The averment that Southern Pacific Company is in possession of the premises, devoting them to public use and railroad purposes, necessarily shows that the only cause of action is one for damages; and for that the legal remedy is adequate.

On such facts the right of the public to have the land used for its benefit is paramount. The private right, if there was one, has been appropriated to the

public, leaving nothing to the owner but a right to the compensation allowed by the Constitution.

> *Gordon v. Cadwalader,* 51 Cal. Dec., p. 328 (March 8, 1916).
> *Gurnsey v. Northern California Power Co.,* 160 Cal. 699.

Accordingly there could be no title remaining in either of the plaintiffs, or in Central Pacific Railway Company, unless the latter was entitled by virtue of the public appropriation and use, and if plaintiff could have no title and defendant none except such as was paramount, then the bill is bad on its face.

As said in *California Gas & Oil Co. v Miller,* 96 Fed. 20, at p. 24, "the acts charged are such as necessarily imply that defendants are in possession." Here the application of the property to railroad uses as alleged necessarily implies that only a right of compensation remains. There is nothing left which can be tried on such a bill as this.

The action for damages is adequate, because on the face of the bill it appears that all of the property is devoted to public use. Therefore, all private titles are extinguished by the appropriation, and nothing remains except a right in the owner, who was such at the time of taking, to sue for his just compensation.

The only remedy against the defendant Southern Pacific Company, in possession as a public service corporation, is for damages for the value of the property at the time that the Southern Pacific Company

took possession, assuming that no proceeding in eminent domain has been heretofore had, and no grant was made to that defendant.

Gordon v. Cadwalader, 51 Cal. Dec., p. 328 (March 8, 1916).
Gurnsey v. Northern Pacific R. R. Co., 158 699;
Roberts v. Northern Pacific R. R. Co., 158 U. S. 10;
Wood on Railroads, Vol. 2, p. 994;
Elliott on Railroads (2nd Ed.), Sec. 1000;
Ency. of U. S. Sup. Court Reports, Vol. 5, p. 778.

Such an action for damages against the Southern Pacific Company for the value of the property is an action at law, and not in equity.

Kohl v. United States, 91 U. S. 367-376.

POINT II. THE FEDERAL AND NOT THE STATE PRACTICE AND PLEADING GOVERNS.

Enlarged rights derived from state statutes will be enforced in Federal Courts only according to the procedural distinctions between law and equity which existed in 1789 when the Judiciary Act was passed. (See appellant's Brief, p. 12.) It is provided in that act (Judicial Code, sec. 267), that:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

See 4 Fed. Stat. Anno., p. 530 and notes; also 1912 supplement to same, Vol. 1, p. 243.

By virtue of this statute a Federal Court cannot take jurisdiction of a suit *quia timet* on its law side merely because a state statute has provided that a so-called ejectment action may be had against one out of possession.

McConihay v. Wright, 121 U. S. 201, 205.

Conversely no suit will be entertained in equity, by name to quiet title, which in essence is an action of ejectment brought by one out of possession against one in possession to recover that possession on a trial of title.

Whitehead v. Shattuck, 138 U. S. 151.

In other words, the distinction between law and equity prescribed in Federal Courts by the Federal Constitution and the Judicial Code will not yield to allow a statutory right to be tried by some procedure laid down in the State statute. The Federal Courts may enforce the right, but they will not follow the variant procedure enacted by the State Legislature.

Sufficiency of the bill to satisfy the state statute is not the test in Federal Courts.

Appellant's contention, printed in black letter on p. 29 of their brief, is not correct in law. It is obnoxious to the well settled rule of Federal practice maintaining the distinction between law and equity

procedure and to all the distinctively Federal procedure. Moreover, the cases cited by appellant do not support it. Thus:

Harding v. Guice, 80 Fed. 162 (cited appellant's Brief, p. 30), was a suit to quiet title to *wild land* in actual possession of neither party; and it was therefore within the established rules.

Gillis v. Downey, 85 Fed. 483 (cited appellant's Brief, p. 29) merely holds that an allegation of *possession by plaintiff* of mineral locations will sustain an equitable suit to quiet title against an answer denying validity of the patents later acquired to such lands alleged to have been non-mineral. This case also is in complete harmony with Federal rules and opposed to the principle to which it is cited.

California Gas & Oil Co. v. Miller, 96 Fed 10, 20 (cited appellant's Brief, p. 31), did not hold what is ascribed to it. It involved exceptions to a bill which alleged a mineral location and *possession in complainant* thereunder, also that defendants pretented to a forfeiture and a relocation. It was held that this sufficed without anticipating the particular claims of defendants to state a case under California Code Civ. Proc, sec. 738, but that it *pleaded possession in defendants* for which reason the bill could not be maintained. Appellant failed to quote the material portion of this opinion found in 96 Fed. 23-25.

Wehrman v. Conklin, 155 U. S. 314 (cited appellant's Brief, p. 32), was a bill to stay an action of ejectment, and to quiet title in *complainant,* who alleged himself to be *in possession,* and also that his title was good,

but that there was a defect therein which defendant was estopped to urge and which estoppel could not be as well made in the ejectment suit. This was held to make out a case in equity. The rule that parties will be relegated to common law remedies if adequate was reaffirmed on authority of *Holland v. Challen; Whitehead v. Shattuck;* and other cases. Appellant did not quote the material portion of this opinion. It follows the portion which it did quote. See 155 U. S., p. 325, at bottom.

Holland v. Challen, 110 U. S. 15 (cited appellant's Brief, p. 31), involved land not occupied by either party, or at all, and in such case it was held that the suit would lie in the Federal Court under the enlarged right given by the state statute.

The foregoing are all the authorities cited to support the black letter proposition (Appellant's Brief, p. 29), that the Federal Courts will take jurisdiction if the facts alleged suffice to come under the state statute. None of them do support it, and from other parts of this brief it will appear that no sound authority could be found to support it. The substantive facts entitling one under a state statute must always be so pleaded as to make a case consistent with the practice in law or equity in that side of the court to which plaintiff resorts.

See

McConihay v. Wright, 121 U. S. 201, 205;
Whitehead v. Shattuck, 138 U. S. 151.

POINT III. THE COMPLAINT STATED NO CAUSE OF ACTION IN LAW OR EQUITY.

Title of complainant.

Complainant alleges that the interests of the public require that the property be not used exclusively by defendants (Trans. p. 18) ; and, this being equivalent to alleging that it is impressed with a public use, complainant cannot recover without proof that it has title for and behalf of the public to such use, and that it is superior to the public use which by the allegations appears to be in defendants. No such allegation appears. Hence, the bill is bad in any aspect, legal or equitable.

There can be no cause of action but one for damages; and complaint does not show itself entitled to that.

Sufficiency of the amended bill under California Code of Civ. Proc., section 738, 379, 380. (Appellant's Brief, p. 24.)

Bearing in mind the rule already adverted to (Point II) that the state procedure is not imported into a Federal Court administering rights derived from state statutes, it is not material whether the complaint would have been good under the state practice; because the rules of pleading and the forms of actions are part of the procedural law of the state, and in California distinctions therein are abolished by the Codes.

Nevertheless, it may be said that the complaint is bad under the California Code of Civil Procedure, because it shows that no cause of action to recover possession or title could lie on behalf of any one. There could be no action but one for damages for the taking of land and applying it to a public use without condemnation, as held in a recent decision of the California Supreme Court (March 8, 1916) in *Gordon v. Cadwalader,* 51 Cal. Dec., p. 328.

The California rule as to real property in possession of a public service corporation and used by it in discharging its duties to the public, which is the allegation here. (Par. IX, amended complaint. Trans. p. 17), will control the rights as between complainant and defendant Southern Pacific Company, and only such cause of action as is cognizable in the state court can be the basis of action in the Federal Court. The California authorities will not permit ejectment or an injunction or any interference with the possession, but will allow damages to the owner of the land at the time of the taking, to be ascertained in the same way as if the public service company was condemning in the first instance, and a present claimant to land cannot claim such damages unless he has a special assignment of the cause of action from the owner at the time of the taking.

Gurnsey v. Northern Cal. Power Co. 160 Cal. 699, 712.

Complainant should have amended his complaint, and set up damages and ownership at the time of taking.

See also

Fresno, Etc. Co. v. Southern Pacific Co., 135 Cal. 202;
Southern Cal. Ry. Co. v. Slauson, 138 Cal. 344;
Crescent Canal Co. v. Montgomery, 143 Cal. 252;
Gordon v. Cadwalader, Vol. 51, Cal. Dec., p. 328, decided by Cal. Supreme Court March 8, 1916.

Propriety and necessity of taking the particular land is not now subject to judicial question.

When possession has been taken and the property applied to right-of-way, sheds for freight, or any other proper and incidental railroad uses, no further question of necessity of the appropriation or the public nature of the use made remains for the courts.

It is said in *15 Cyc.*, 634, 635, that:

> "Under a power conferred by the legislature the selection by the condemning company of land required for the construction of a railroad, or the location of its depot and other buildings, or the location of its route between certain fixed termini, cannot be controlled by the courts, if such selection is made in good faith, and is not capricious or wantonly injurious, or in some respect beyond the privilege conferred by the charter or statute."

Mr. Lewis says (*Lewis Eminent Domain,* 3rd Ed., Sec. 815), that:

> "In general the condemnor is allowed a large discretion in determining the quantity necessary and the exercise of this discretion will not be interfered with except in case of abuse."

California Code Civ. Proc., Sec. 1238, permits appropriation by railroads for all of the uses, such as wharves, freight sheds and switch tracks mentioned in the complaint.

It thus appears that there is an application of the land to public uses, which the courts cannot question, at least in a suit such as this.

POINT IV. THERE WAS NO DEFAULT AND DECREE *PRO CONFESSO* WAS ERRONEOUS.

It is not true that defendants were in default. (See appellant's Brief, p. 112.)

By terms of New Equity Rule 32 they had ten days to put in a *new* or *supplemental* answer after amendment of the bill. This was done by moving to dismiss. The motion to dismiss was a demurrer, and under New Rule 29 a demurrer may be made by answer. Such a motion is a "defense."

Wilson v. American Ice Co., 206 Fed. 736, 738.

Accordingly there was an answer standing as to each and every part of the bill when default was erroneously claimed by plaintiff's-appellants.

In *French, Trustee, v. Hay, et al.,* 22 Wall., p. 246, it is said that the general rule is that an amendment of a bill gives the defendant the right to answer as if he had not answered before, and, again, on the same page, "But the amendment is sometimes of such a character that it is regarded as independent graft upon the original case and the beginning of a new lis pendens. The case of *French, Trustee, v. Hay, supra,* was approved in *Blythe v. Hinckley,* 84 Fed., p. 228, wherein, on page 224, it is said:

> "But it is a general rule that any amendment of a bill, however trivial and unimportant, authorizes a defendant, after his appearance, to put in an answer making an entirely new defense, and contradicting his former answer, if one has been filed. 1 Daniell, Ch. Prac. (6th Am. Ed.) 409; 1 Frost. Fed. Prac. (2d Ed.) 280; French v. Hay, 22 Wall. 246: Nelson v. Eaton, 13 C. C. A. 523, 66 Fed. 376; Fisher v. Simon, 14 C. C. A. 443, 67 Fed. 387."

In the case at bar it is clear that the defendants had the right to put in a new answer, or adopt their former answer and file a supplemental answer as to the new matter set forth in the amendment, and, likewise, had the right to move to dismiss portions of the amended bill and the amendment to the amended bill, not included in the original bill, and also had the right to amend their answer to the original bill by raising the defense that no valid cause in equity is stated, even assuming that, under the rule, they did not have the right to move for a dismissal, based upon the amended bill and the amendment thereto,

but as the objection that the complaint did not state a valid cause of action could have been taken advantage of by answer to the original bill, if the points were available, the motion to dismiss raising that defense, can be deemed an amendment to the answer to the original bill, or by reason of the stipulation and order of court entertaining the motion to dismiss as to the amended bill. (See New Equity Rule No. 32.)

The order that the bill be taken pro confesso.

When the amended bill was filed it set up, for the first time, new matter, which was destructive of the alleged cause of action, and it was the duty of the defendants to call the attention of the Court to this by a notice of motion to dismiss for insufficiency, so as to avoid a trial upon the merits, as that would be unnecessary.

Rule 12 of the New Equity Rules requires the defendants, within the time therein allowed after the service of subpoena, to file their answer, or other defense.

Rule 16 requires the defendants, unless the time shall be enlarged, to file their answer, or other defense, to the bill within the time named in the subpoena, and in default thereof, the plaintiff may, at its election, take an order as of course that the bill be taken *pro confesso.* If, however, the answer, or other defense, has been filed, no such order *pro confesso* can be had. The notice of motion to dismiss

for insufficiency is a defense at least, and, hence, prevents the taking of an order *pro confesso.*

See

Wilson v. American Ice Co., 206 Fed. 736, 738.

Rule 30 sets forth what the answer shall contain. It requires the defendants to set out their defense to each claim. The objection of insufficiency of fact constitutes a valid defense in equity, which might heretofore, under the old rules, have been made by demurrer or plea, but now shall be made by motion to dismiss, or in the answer. Consequently, the motion to dismiss for insufficiency of fact constitutes a valid objection in equity and constitutes a defense based upon a matter of law corresponding to a demurrer to the bill under the former practice. If the defendants, however, move to dismiss the bill, or any part thereof, for such insufficiency, the motion may be set down for hearing, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered.

Rule 32 provides that where an amended bill shall be made after answer is filed, the defendants shall put in a new or supplemental answer within ten days after that in which the amendment or amended bill is filed, unless the time is enlarged, or it is otherwise ordered by the Judge of the court, and upon a default, proceedings may be had as upon omission to put in an answer.

Rule 32 must be construed in connection with all of the other rules, and particularly in connection with

Rule 29. As the defendants can move to dismiss the bill, or any part thereof, it is clear that they have the right to dismiss the amended bill, or any part thereof, for it will often occur that matters will be set up on the amended bill which will render the same insufficient, although the original bill may not be open to the attack of insufficiency. In other words, whenever any complaint, whether in original form, or by separate amendment, or in the form of an amended complaint, is before the Court and is subject to insufficiency of fact to constitute a valid cause of action in equity, it is the right of the defendants to move to dismiss the same before they are required to answer upon the merits.

Rule 32 recognizes that no default can be taken for failure to answer an amended bill, except upon an omission to put in an answer, and there is no omission to put in an answer if a motion to dismiss for insufficiency is filed, unless said motion has been denied and five days has elapsed.

The order of Court made on December 1st, 1915, was practically a dismissal of the action, and there can be no order that the bill be taken *pro confesso* after the action has been dismissed.

After the Court made an order dismissing the action, the only decree that could be entered was one dismissing the action, and the clerk had no power or authority to enter any other order, as there was nothing pending upon which any order could be predicat-

ed, except the order or decree of dismissal, in conformity with the order of the Court.

If the amended complaint which was filed is to be regarded as a new pleading, taking the place of the original complaint as a pleading, and this has been the view of the Court, as well as the understanding of all the parties, then it is subject to Rule 29, which gives the defendant the right to move to dismiss the bill, or any part thereof, based upon insufficiency of fact, to constitute a valid cause of action in equity, and this postpones the time to answer on the merits until five days after notice of the denial of such motion. If, on the other hand, the amended bill be not regarded as substitutionary of the original bill, but only an amendment to the bill as to the matter amended, then the defendants, under Rule 32, have the right to put in a new or supplemental answer thereto. This means that they have the right to rely upon their original answer to the original bill as to all issues which are contained in the amended bill, and may answer by a supplemental answer to their original answer as to all new matter set forth in the amended bill, or they have the right, if they so desire, to file a new answer to the amended bill as a whole. Consequently, under this view of the case, the original answer to the original bill standing in the case will prevent a decree or an order *pro confesso*, and, necessarily, as to the matter contained in the amended bill, which is not in the original bill, it is subject to Rule 29, which allows the defendants to move to dismiss a part of the bill, as well as the whole bill, and,

consequently, the motion to dismiss would apply to the amendments to the original bill, incorporated in the amended complaint, and no default could be had thereon until five days' notice after the denial of such motion. In addition thereto, it may be said that Rule 32 does not require an answer to be filed to an amended bill, if the time has been enlarged. The effect of Rule 29 is to enlarge the time to answer, if a notice of motion to dismiss for insufficiency is made, and, besides, the order of dismissal made by the Court before the application that the bill be taken *pro confesso* amounts to a compliance with the provisions of Rule 32, reading, "or it is otherwise ordered by the Judge of the court." In other words, the dismissal of the bill before the application that the bill be taken *pro confesso* amounts to an order that the defendants shall not answer, as there is nothing to answer. However, we are of opinion that an answer may be either upon its merits, or by setting up a matter of law, as the rules recognize that the objection as to the sufficiency of the bill may be taken either by motion, or in the answer; hence, the motion itself is an answer, and while it is pending, no default exists.

Again, Rule 16 provides that if the defendants do not file their answer, or other defense, within the time named in the subpoena, the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*. As the defendants, within the time, have filed their defense, namely: a claim and objection that the bill is insufficient to state a cause

of action in equity, it follows that the condition required by Rule 16 for an order that the bill be taken *pro confesso* has not been fulfilled, for the making of the defense prevents the default, as well as the filing of the answer.

The District Court had the right to vacate the order entered by the clerk (Rule 17), and did so (Trans. p. 42). No objection appears in the record on the part of the appellant to the order and no exception is noted.

Under Rule 29 of New Equity Rules, every point of law arising upon the face of the bill for insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole as a material part of the cause of action stated in the bill may be called up and disposed of before final hearing at the discretion of the Court. By the same rule, it is provided that if the defendant moved to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

It follows from Rule 29:

(a) An amended bill which is radically different from the original bill is subject to a motion to dismiss.

(b) If an amendment is added to the original bill

or to the amended bill the amendment so added is subject to such motion to dismiss, because it is a part of the bill, and a motion to dismiss as to the same cannot be made until the amendment is made.

The decree pro confesso was properly vacated and set aside. (See appellant's Brief, p. 128.)

First, because the opinion ordering dismissal was on file and the case was thus virtually terminated by it.

Second, because no default existed to which the rules of court for entering decree *pro confesso* could apply.

Third, because even had the Court ruled adversely on defendant's motion to dismiss, defendants would have been entitled to five days in which to answer thereafter. This is expressly provided in New Equity Rule 29, last sentence. Before such time and condition it was premature to take the bill as confessed even if the state of the pleadings had permitted, which, in this case, they did not.

POINT V. DISMISSAL OR TRANSFER OF CAUSE.

Appellant claims that the suit should have been transferred to the law side, if the bill was insufficient in equity. (Appellant's Brief, p. 111.)

The District Court would have done so but for one

obstacle (Trans. p. 39). The complaint did not state a cause of action at law. Complainant concedes this (Appellant's Brief, p. 112).

The District Court gave the complainant the right to amend its bill, but it refused (Trans. p. 45). Hence, it cannot complain that the cause was not transferred to the law side, or that it was dismissed. As the defendant Central Pacific Railway Company was alleged to be out of possession, no amendment could be made to state a cause of action on the law side. As the defendant Southern Pacific Company was alleged to be in possession of all of the property, devoting it to public purposes, this discharged equity jurisdiction, and hence the Court could have transferred the cause to the law side and then dismissed it because it did not state facts to constitute a cause of action, but instead gave the complainant the right to amend so as to cover the necessary facts to constitute a cause for damages, but complainant having refused to amend, then dismissed it (Trans. p. 45).

It would have been error to transfer the cause to the law side, for the reason that it did not "appear that [the] suit commenced in equity should have been brought as an action on the law side." New Equity Rule 22. (See appellant's Brief, p. 111.)

It will have been seen from previous argument that in any view of the amended bill it fails to state a cause of action at law or in equity. There was therefore no object in transferring it to the law side merely to have dismissal entered on that side. If plain-

tiffs have any cause of action it is one for damages which will require an entirely new complaint with further facts set out. New Rule 23 implies that the case need not invariably be sent over.

As to the dismissal without prejudice to an action at law.

Appellant never asked that the dismissal should be made without prejudice to an action at law. How then is it aggrieved?

It could have amended the complaint, as leave was granted to do so, but declined to amend, so as to state a good cause of action at law. If, however, the decree, as made, is not to be regarded as without prejudice to an action at law, this does not require a reversal, but only a modification of the decree directing the District Court to add to the decree "without prejudice to an action at law."

Appellant's contention, however, is without merit or substance. If appellant has a cause of action for damages, this judgment is no bar to such cause, when properly pleaded. All that is barred is the right to sue to quiet title, or for possession under the facts pleaded in this bill.

Not until the amended complaint was filed (June 4th, 1915), did the points urged by appellee for a dismissal of the action fully appear, and upon the filing of the same, appellee moved promptly to dismiss. No objection was urged to the right to so

dismiss, but appellant expressly stipulated that the motion to dismiss should be deemed to apply to the amended bill with the amendment of June 21, 1915, added (Trans fol. 111). Why did not appellant object to the motion to dismiss the amended bill at the time the motion was argued, instead of, in fact, stipulating that it should be taken and deemed to be made with reference to, and to apply to, the complaint, as amended June 21st, 1915, by the amendments filed on that date. What happened before the amended complaint was filed became immaterial for two reasons:

(a) The amended bill and amendment changed the original bill materially.

(b) The stipulation, as was made, was a consent to the making and hearing of the motion to dismiss the amended bill with the amendment of June 21, 1915, considered a part thereof.

POINT VI. OBJECTION TO JURISDICTION WAS NOT WAIVED.

It is not true that defendants have joined issue in equity.

The equitable defenses made in the answer are cognizable at law, and therefore do not elect to treat the complaint as one in equity. *There was no waiver.*

Moreover the amendment of the bill after answer entitled defendants to put in any new answer or

defense or any supplement to their original answer which was appropriate to the new matter added to the bill.

The foregoing propositions fully answer the contention of appellants at page 81 of their brief.

The rule that equitable estoppel is a legal as well as an equitable defense is laid down in

> *Dickerson v. Colgrove*, 100 U. S. 578;
> *Kirk v. Hamilton*, 102 U. S. 68.

With regard to the effect of amending the bill after answer the New Equity Rules No. 32 provides that defendant shall put in a "*new or supplemental* answer within ten days after that on which the amendment . . . is filed." This substantially the same as Old Rule 46.

The chancery practice generally was that after an amendment of a bill, however trivial and unimportant, defendant had a right to put in an answer making an entirely new defense; and he might plead, answer, or demur to the material matter of amendment the same as if it were an original bill; but one who had answered an original bill could not assign any cause of demurrer to which the original bill was open unless the amendment changed the nature of the case.

> *1 A. & E. Encyc. Pl. & Pr.* 490, citing 1 Daniell Chan. Pr., 5th ed. 409 and numerous state decisions;
> *6 A. & E. Encyc. Pl. & Pr.* 435, citing 1 Daniell Ch. Pr., 5th ed, 582.

If the new matter had the effect of destroying the equities of the bill, then necessarily it would, even after answer, be demurrable as a whole for want of equity. This applies where the nature of the case is changed by the amendments.

1 Daniell Chan. Pr., 5th ed., pp. 409, 583.

Nelson v. Eaton, 66 Fed. 376 at 378, quotes these as the rules. This was decided when Old Equity Rule 46 was in force, and New Equity Rule 32 is unchanged in substance; hence, this is the rule today having regard to the abolishment of technical distinctions between pleas, demurrers and answers.

By virtue of New Equity Rule 29 all defenses may now be made by answer *or* by motion to dismiss. Issues of law may be tendered by the answer as was held in *Boyd v. New York, Etc. R. Co.,* 220 Fed. 174 at 178. Accordingly the answer now includes the former functions of a demurrer. A motion to dismiss operates as a demurrer, and is a "defense."

Hyams v. Old Dominion, 203 Fed. 681;
Wilson v. American Ice Co., 206 Fed. 736;
Alexander v. Fidelity Trust Co., 215 Fed. 791;
Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294;
Destructor Co. v. Atlanta, 219 Fed. 996.

Since the answer now also includes demurrer, the motion is an answer, because things equal to the same thing are equal to each other. The only difference as pointed out in *Alexander v. Fidelity Trust Co.,* 214 Fed. 495, 497, is that a motion to dismiss

may be set down for hearing on five days' notice by either party, while when law issues are made by answer they are heard on trial unless the Court sets them down for preliminary hearing.

POINT VII. THE ATTEMPTED CONSOLIDATION.

The trial court, on motion of complainant-appellant (Trans. p. 42), granted a consolidation of fifteen other cases with the one by which this appeal is entitled. This order was made on December 20, 1915. The opinion on motion to dismiss was filed December 1, 1915, and the order for dismissal was granted on December 1, 1915. The decree of dismissal was filed and entered on December 22, 1915 (Trans. pp. 39, 40, 42, 44).

The effect of a consolidation is to leave the causes of action distinct.

> *Mutual Life Ins. Co. v. Hillmon,* 145 U. S. 293.

Each record is that of an independent suit . . . and a decree in one is not a decree in the other unless so directed.

> *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.,* 95 Fed. 497, at 506.

The Federal statute allowing consolidation permits it "when causes of a like nature or relative to the same question are pending," etc. R. S. U. S., sec. 921; 4 Fed. Stat. Anno, p. 587.

Under similar statutes the state courts have held that consolidation must take place before trial, and that it cannot be had after judgment to facilitate and cheapen appeals.

> *1 Corpus Juris.,* p. 1134, text 57, 58; also p. 1132, text 29, citing Prinz v. Moses, Kan., 66 Pac. 1009.

It is also said that apparently the same conditions govern in Federal as in state courts respecting propriety of consolidation.

> *1 Corpus Juris.,* p. 1128, text 62.

In the cases of *Headrick v. Larson,* 152 Fed. 93, 96; *Louisville & N. R. Co. v. Summers*, 125 Fed. 719; and *Brown v. Spofford,* 95 U. S. 474, the irregularity of consolidating causes to be appealed on one record is pointed out, but because there was no objection the Court did not refuse jurisdiction of the appeals in the causes which were thus insufficiently before it.

In *United States v. Baltimore & O. S. W. R. Co.,* 159 Fed. 33, affirmed in 220 U. S. 94, the same was done on a stipulation made that all should abide the event of one judgment.

In the case at bar objection was made and exception noted (Trans. p. 43), and no stipulation was

made. Therefore, this Court should refuse to entertain any appeal except in the one cause and record before it.

CONCLUSION.

The decree of dismissal should be affirmed.
Dated March 24, 1916.

Respectfully submitted,

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